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## SUMMARY

In its Reply Comments, ICSPTF reviews the basis for the

Recommendation for the Commission to recommend the provision of

legal issues raised. In addition, although Pacific Bell and Nevada Bell claim that there is a factual dispute regarding two features of inmate-only services (PIN numbers and call recording and monitoring), the capability of providing those two features is not denied. Even if the two features were in actual dispute, the remaining facts (the other features being provided by LECs with inmate-only phones) are not disputed, and declaratory relief remains appropriate.

The Commission should declare unlawful the LECs current marketing practices of marketing inmate-only phones and associated enhanced services through regulated accounts.

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of the Petition                    )  
of the Inmate Calling                            )  
Services Providers Task Force                    )  
for Declaratory Ruling                            )       RM 8181

TO: The Commission

REPLY COMMENTS OF THE INMATE CALLING  
SERVICES PROVIDERS TASK FORCE

The Inmate Calling Services Providers Task Force ("ICSPTF") of the American Public Communications Council ("APCC") hereby replies to the comments filed by a number of parties regarding ICSPTF's Petition for a Declaratory Ruling ("Petition").

I. Introduction

As detailed in the Petition, ICSPTF requests a declaratory ruling by the Commission that specialized phones for inmate-only services are customer premises equipment ("CPE"), and that certain of the specialized inmate-only services offered by local exchange carriers ("LECs") are enhanced within the meaning of Computer II<sup>1</sup> and its progeny. Further, ICSPTF requests that the Commission find that the LECs' current practices of providing inmate-only phones and enhanced services associated with inmate-only phones through their regulated accounts are unlawful under Computer II and its progeny.

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<sup>1</sup> Amendment of Section 64.702, 77 FCC 2d 384, (1980), recon., 84 FCC 2d 50, further recon., 88 FCC 2d 512 (1981), aff'd sub nom. Computer & Communications Industry Association v. FCC, 693 F.2d 198 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983) ("Computer II").

ICSPTF's Petition raises a very simple question: did the Commission intend to include highly specialized inmate-only phones in the same category as public payphones. In Computer II, before the Commission had authorized interconnection of any payphones other than carrier provided payphones, the Commission excluded LEC public payphones from the definition of CPE. Explaining that

of day. TeleFlash publication of Southern Bell and South Central Bell (Attachment 1). BellSouth also offers call restriction using a PIN number identifying the inmate. In its brochure entitled "Telephone Service so Specialized We Have to Keep it Under Lock and Key," BellSouth states that "Some facilities may need the extra protection of inmate PIN numbers to further track the calling patterns of their inmates. This enhancement can limit the inmate to dialing only those numbers that have been pre-approved for the individual inmate." (Attachment 2)

The functionalities and phone systems described in Attachment 1 and Attachment 2 and in ICSPTF's Petition are totally unrelated to the Commission's concerns, in Computer II/Tonka, with ensuring the availability of a payphone to the general public. The LECs' attempt to shield their competitive activities in the inmate-only phone market under the umbrella of the Computer II/Tonka exclusion affirms the wisdom of the Commission's policy narrowly construing exceptions to the Computer II rules.<sup>4</sup> Inmate-only phones are not what the Commission had in mind in the Tonka decision or in excluding LEC public payphones from the Computer II requirements. The Commission should so rule in response to ICSPTF's Petition.

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<sup>4</sup> Amendment of Part 68, 94 FCC 2d 5, 15 (1983), recon. denied, FCC 84-145, FCC Rcd (1984) ("NCTE Interconnection"). See also WAIT Radio v. FCC, 418 F.2d 1153, 1157, cert. denied 409 U.S. 1027 (1969); Applications for authority to construct and operate an Automated Maritime Telecommunications System, 3 FCC Rcd 4690, 4692 (citations omitted) (1988).

II. Computer II Principles Apply to LEC Operations Even with Varying Degrees of Competition and Regardless of the Registration Requirements Imposed on Various Types of Equipment

In Computer II, the Commission made a policy decision on the appropriate treatment of CPE. Having determined to deregulate CPE, the Commission determined that the costs of unregulated services should not be borne by regulated operations. The Commission adopted accounting regulations to prevent misallocation of costs between, and cross-subsidy between, the regulated and unregulated operations of LECs. See Petition at 8-9 (citations omitted). The safeguards established by the Commission were put in place precisely because the LECs have both the ability and the incentive to cross-subsidize provision of unregulated services.

In reaching its decisions in Computer II, the Commission considered the degree of competition the LECs face as a predicate



CPE, the Commission has already made the determination that the public interest is disserved by having the LECs offer the inmate-only calling phones as a regulated activity. By arguing that ICSPTF must again establish in this proceeding the need for inmate-only phones, as CPE, to be offered as a deregulated activity, SWB is re-arguing the rationale for the Commission's policy decision on CPE. Similarly, Connecticut's prohibition of competition with Southern New England Telephone Company ("SNET") in the public payphone market does not affect the deregulated status of CPE. See Comments of the Southern New England Telephone Company ("SNET Comments") at 4. If the LECs want a re-examination of the Commission's policy with respect to particular equipment, they must seek a waiver of the Commission's CPE rules, with the attendant burden.

In deciding Computer II and implementing Rules governing the provision of CPE, the Commission also addressed the LECs' ability to compete with independent providers. Specifically, the Commission found that deregulation of CPE "will provide carriers the flexibility to compete in the marketplace on the same basis as any other equipment vendor." Computer II at 447. As has been shown in the CPE marketplace, the LECs have been able to compete, and consumers have been well served. There is no reason to assume that LECs could not adapt equally well to a classification of inmate-only phones as CPE. If LEC inmate-only phones are classified as CPE, the LECs will still be able to compete with independent providers (and will still be able to provide inmate-

only phones in states such as Connecticut which do not currently authorize competition in the payphone market generally). Classification of inmate-only phones as CPE merely means that inmate-only phone activity of the LECs must be conducted outside of regulated accounts.

BellSouth nonetheless complains that, if inmate-only phones are treated as CPE, the LECs will somehow be competitively disadvantaged. Opposition of BellSouth at 9-10. BellSouth argues that LECs' ability to recover costs, as they do now through interstate access charges, would be lost. Id. at 9-10. BellSouth maintains that, if LEC inmate-only phones are deregulated, the Bell Operating Companies ("BOCs") would be disadvantaged because of the MFJ restriction on BOC sharing of revenue with interexchange carriers. See Opposition of BellSouth at 10. But the prohibition on BOCs' sharing revenue with interexchange carriers applies regardless of whether inmate-only phones are considered CPE or not.<sup>5</sup>

Indeed, BellSouth's statement that the BOCs must be able to recover the costs of inmate-only phones through the separations process and regulated accounts in order to compete is particularly

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telling. What BellSouth seems to be saying is that there is an existing cross-subsidy of LEC inmate-only phone operations by other, regulated operations. This cross-subsidy of competitive operations from revenues for regulated services is exactly the

19528, 56 F.C.C. 2d 593 at 600 (1975). Therefore, Part 68 is irrelevant to whether LEC inmate-only phones are treated as CPE for regulatory, Computer II, public policy reasons. Moreover, as MCI noted, Part 68 was established prior to the Commission's decision in Computer II. MCI Comments at 1-2. The technical requirements and requirement for network protection of Part 68 thus applied to LEC CPE before and after deregulation of CPE. Computer II concerned the entirely different issue of the appropriate regulatory classification of equipment provided by LECs; exclusion of LEC provided payphones was based on different policy considerations, as further discussed in section III below. While LEC provided public payphones are excluded from both Part 68 and Computer II, the exclusions were made for different reasons; reliance on Part 68 for exclusion of inmate-only phones from treatment as CPE is, therefore, misplaced.

### III. The Computer II/Tonka Exclusion of Payphones from the Definition of CPE is Inapplicable to Inmate-Only Phones

#### A. The Exclusion of Payphones from Computer II/Tonka Does Not Extend to Inmate-Only Phones

A number of commenters argue that the exclusion of LEC payphones from classification as CPE is to be broadly construed to include inmate-only phones. SWB contends that the "pay telephone exclusion is well-established by FCC precedent and broadly construed to provide the public access to telecommunications." SWB Comments at 3; see also Pacific/Nevada Comments at 3.

The LECs are wrong in claiming that exceptions to established

Commission policy are broadly construed. The general rule is that exceptions to established policy are narrowly construed. The courts have cautioned against eviscerating a general rule by broadly construed exceptions. See e.g., WAIT Radio v. Federal Communications Commission, 418 F.2d 1153, cert. denied 409 U.S. 1027 (1969). See also BellSouth's Petition for Declaratory Ruling or, Alternatively, Requests for Limited Waiver of the CPE Rules to Provide Line Build Out (LBO) Functionality as a Component of Regulated Network Interface Connectors on Customer Premises, 6 FCC Rcd 3336, 3343 (1991); Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, Petition for Waiver of the Dark Fiber Filing Requirement, Petition for Emergency Relief, 5 FCC Rcd 6772, 6774 (1990). The Commission has specifically applied this principle to CPE. Equipment located on a customer's premises is CPE; to establish that such equipment should be treated other than as CPE requires overcoming a "high threshold burden." Amendment of Part 68, 94 FCC 2d 5, 15 (1983), recon. denied, FCC 84-145, \_\_\_ FCC Rcd \_\_\_ (1984) ("NCTE Interconnection"). See also WAIT Radio v. FCC, 418 F.2d 1153, 1157, cert. denied 409 U.S. 1027 (1969); Applications for authority to construct and operate an Integrated

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B. The Integration of the Telephone Instrument and the Service Available at Payphones Does Not Distinguish LEC Inmate-Only Phones from Inmate-Only Phones Provided by Independent Vendors

phones and independently provided inmate-only phones should be treated the same for regulatory purposes. Since it is plain that independently provided inmate-only phones are CPE, the LECs' rationale leads to the conclusion that all inmate-only phones should be treated as CPE.<sup>7</sup>

If all inmate-only phones should be classified as CPE, the Commission must find a basis to distinguish inmate-only phones from payphones used by the general public; if no distinction between inmate-only phones and public payphones can be found, the Commission would necessarily have to overrule Tonka. Although the Commission can certainly overrule Tonka if it so chooses, it is not necessary to do so in order to address the issues raised by ICSPTF. As explained in the Petition, and as discussed herein, inmate-only phones are distinguishable from the public payphones that were at issue in Tonka, and once the payphones at issue in Tonka are distinguished from the inmate-only phones at issue in the Petition, the Commission can grant the Petition without disturbing Tonka.

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<sup>7</sup> Further, the rationale regarding integration which the LECs rely on to claim that LEC inmate-only phones are within the Computer II/Tonka exclusion (and are network services) applies equally to all public payphones (both those provided by LECs and those provided by IPPs). ICSPTF does not disagree that all inmate-only phones, and all payphones generally, should be treated as CPE. As NYNEX notes, there is a pending petition for declaratory ruling, filed by the Public Telephone Council, concerning classification of LEC payphones. NYNEX Comments at 1-2. While the PTC petition concerns public payphones generally, ICSPTF's Petition concerns only inmate-only phones with their specialized applications and features and functions unique to the correctional facility environment. As discussed in the text following this note, the Commission need not reach the broader issue of whether Tonka is correctly applied to public payphones in order to grant ICSPTF the relief it seeks here.

Tonka focussed on the availability of payphone service for the transient public; the transient public is significantly different from the inmate population using inmate-only phones. Inmate-only phones are not held out to the general public and have no role to play in serving the transient public. See section III(C) below. At the time Tonka was decided, competition in any payphone market, and in the public payphone market in particular, was just beginning, and the direction of payphone competition could not be realistically foreseen. The primary concern in Tonka focussed on the availability of payphone service to the transient public.

Further, Tonka was concerned with the availability of a very generalized "dial-tone service" to the public. Tonka did not address the availability of highly specialized service tailored for a unique environment, such as that in correctional facilities.

It is these factors, not the erroneous "integration of the phone and service," that can distinguish inmate-only phones in the present context from the public payphones at issue in Tonka. Rather than broadening the "integration" rationale to create new exceptions to the Commission's basic regulatory regime for CPE, the Commission should recognize that inmate-only phones are CPE.

C. Inmates are Not a Segment of the General Public

Pacific Bell and Nevada Bell characterize inmates as some "segment" of the general public, quoting from Tonka. Pacific/Nevada Comments at 6; see also SWB Comments at 7-8; Ameritech Comments at 2-3. Ameritech states that "[w]hile it is



true that inmates are not extremely 'transient' or 'mobile,' they are in fact no less so than a person caught in an airport between a change of planes. . ." Id. at 3. SWB argues that ICSPTF misplaces emphasis on the transient, mobile public, and claims that "the benchmark test. . .is '[whether] the primary customer of this pay telephone equipment for Computer II regulatory purposes is still the general public or some segment thereof."<sup>8</sup> SWB Comments at 12 (citations omitted); see also SNET Comments at 3-4; US West Comments at 3.

Prisoners are not, in any meaningful sense, a "segment" of "the general public" within Tonka. While there may be examples of other types of phones which are available under controlled conditions,<sup>9</sup> or are commonly used,<sup>10</sup> inmate-only phones are unique

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<sup>8</sup> SWB also states that the specialized needs of correctional facilities do not change the characterization of inmates as some segment of the public. SWB Comments at 10. SWB is mixing the issues. The specialized needs of correctional facilities is relevant to determining whether the increased functionality of inmate-only phones is sufficient to cause them to fall without the Computer II/Tonka exclusion of payphones from the category of CPE. See section III(E) below. That is a different issue than whether or not inmates are a segment of the general public.

<sup>9</sup> NYNEX argues that other phones (which are still considered payphones) are available under controlled conditions, and gives the examples of phones on military bases, and in areas designated for employees only. NYNEX at 2. The more appropriate comparison, according to NYNEX, is between the "public phones" in

and extreme in the degree to which they are made available under conditions of much more tight control than other phones. Other situations do not involve the use of lawful authority to deprive and prohibit the use of private phones so calling can be controlled. To be a member of the public, or some segment thereof, means some control over whether one is a "member" of the public, such as people choosing to be in airports, hotels, or stores.

The LECs also argue that the Commission's exclusion of inmate-only phones from the definition of "aggregator" in Implementation of TOCSIA<sup>11</sup> should not be the basis for distinguishing inmate-only phones from public payphones generally. BellSouth, for example, argues that the definition of 'aggregator' is not relevant to inmate-only phones' classification as CPE because aggregator phones include phone which are not payphones (such as those in hotel rooms and dormitory rooms). Opposition of BellSouth at 4-5.

The Commission ruled in Implementation of TOCSIA that inmate-only phones are not available to the general public. Under TOCSIA, an aggregator is someone who "makes telephones available to the public or to transient users of its premises. . ." 47 U.S.C. § 226 (a)(2). The Commission specifically found that service at inmate-only phones "is not provided at an 'aggregator' location. . ." 6 FCC Rcd at 2752 n.30. In other words, inmate-only phones are not available to the public, and cannot be considered to be in the same category as public payphones.

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<sup>11</sup> Policies and Rules Concerning Operator Service Providers, CC Dkt No. 90-313, 6 FCC Rcd 2744 (1991) recon. denied in part and clarified in part, 7 FCC Rcd 3882 (1992).

D. The Specialized Functions of Inmate-Only Phones, as Well as the Location of Associated Equipment, are Relevant to Whether the Computer II/Tonka Exclusion Applies

BellSouth states that the specialized features of inmate-only phones and service are "legitimate payphone network service functions," and that the specialized functions do not provide a reason for the payphone exclusion not to apply. Opposition of BellSouth at 6. Whether the specialized functions offered at inmate-only phones are network service functions, or basic services, is beside the point. Under IBM,<sup>12</sup> an exception to the Computer II CPE rules cannot be expanded by combining functionality outside the exception with functionality within the exception while still maintaining that the exception applies.<sup>13</sup>

The specialized functionality provided in inmate-only phones takes the phones out of the Computer II/Tonka exception. The purpose of the Computer II/Tonka exclusion of LECPPs from classification as CPE was to provide generalized, dial-tone, calling capability to the general public. Telephones such as inmate-only phones, with highly specialized features, are not the "dial-tone" calling service the Commission was concerned with in Tonka. Rather, inmate-only phones have features and

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<sup>12</sup> International Business Machines, 58 RR 2d 374 (1984) ("IBM").

<sup>13</sup> The LECs misconstrue ICSPTF's reliance on IBM. SWB, for example, reads ICSPTF's Petition as claiming that IBM precludes offering specialized functionality in inmate-only phones. See SWB Comments at 13. ICSPTF is not saying that LECs cannot offer specialized functionality; nor does it rely on IBM for that proposition.

functionalities which enrich and augment dial-tone service to meet particular calling needs; this enrichment "exceeds that which permissibly may be associated with [equipment providing] basic service." Without that enrichment becoming GDE TBM at 280

that is, it must serve the purpose of Tonka to ensure that dial-  
tone is available for the transient, mobile public to meet their  
calling needs. ~~Inmate-only phones do not meet the criteria in~~

#### IV. The LECs Must Provide Enhanced Services Under Appropriate Safeguards

Pacific Bell and Nevada Bell contend that features such as "speed dialing, call forwarding and the other inmate services" are not enhanced services, but are adjuncts to basic service. Pacific/Nevada Comments at 10; see also Opposition of BellSouth at 8-9; SWB Comments at 16; NYNEX Comments at 5-6. ICSPTF did not claim that speed dialing or call forwarding were enhanced services. These features were offered as examples of permissible processing and storage capabilities which facilitate transmission of basic services, but which nonetheless bring the equipment providing this functionality on premises within the ambit of CPE rather than network equipment. See IBM, supra.

The features ICSPTF focussed on were those involving voice storage and call answering. To the extent the LECs now claim voice storage capability is offered through on premises recording and monitoring equipment,<sup>17</sup> the LECs must demonstrate that the CPE is being offered on a deregulated basis.

BellSouth contends that the features described in the Petition merely facilitate use of basic network services. Opposition of BellSouth at 9; see also NYNEX Comments at 6. SWB contends that use of PIN numbers in the inmate-only context is not an enhanced

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<sup>17</sup> In responding to the point that LECs are providing voice mail and voice storage capabilities, SWB concedes that, while it may provide recording and monitoring equipment, it does not provide "service[s]." SWB Comments at 19. But SWB's response does not indicate that the recording and monitoring equipment that it provides is provided on a deregulated basis. See text following this note.

service because it is simply a call management feature, and because it more closely resembles the Call Monitor service found to be basic in NATA<sup>18</sup> than CDAR, which was found to be enhanced in NATA. SWB Comments at 16-18; see also NYNEX Comments at n.11.

As described in the Petition, however, use of PIN numbers with inmate-only phones involves more than simply determining whether a particular call should be blocked or completed. PIN numbers for inmates at inmate-only phones identify which individual inmate makes the call and track the inmate's calling activity. PIN numbers for inmates are not like Call Monitor, which identifies the originating telephone number. See NATA at ¶ 44. The PINs associated with inmate-only service identify a person (inmate) for purposes of monitoring his/her calling activity; this is far different from simply identifying the calling number. Identification of a specific individual, as opposed to a calling station, does not simply "facilitate [the inmate's] use of traditional telephone service." NATA at ¶ 23 (citation omitted). PIN numbers may also be used to charge the caller's account where a debit account system is used for inmate calling. Inmates' calls are, in this sense, tagged like calls are tagged when CDAR is used.

Use of PIN numbers in conjunction with inmate-only phones cannot be characterized as an extension of POTS which facilitates making a call. Use of PIN numbers for inmates must be considered an enhanced service utilizing an information tag permitting

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<sup>18</sup> North American Telecommunications Association ("NATA"), FCC 85-248 (1985).

"storage and retrieval of. . . information [which] is not used in the provision or management of the. . . telephone service." NATA at ¶ 42. PIN numbers and associated functionality must be provided on an unregulated basis, under the safeguards established for LEC provision of enhanced services.

V. The Issues Raised by ICSPTF are Ripe for Declaratory Ruling

Some of the commenting parties claim that the relief sought in ICSPTF's Petition is not appropriate for a declaratory ruling proceeding. See e.g., Comments of Pacific Bell and Nevada Bell ("Pacific/Nevada Comments") at 2; Comments of US West Communications, Inc. ("US West Comments") at 2. All parties opposing the Petition, however, argue with the substantive legal position taken by ICSPTF. This disagreement shows a clear dispute as to the application of the Commission's policies, indicating that there is a need for clarification of the legal questions raised.

The facts concerning the LECs' provision of inmate-only service are essentially not disputed. While a particular LEC may not provide each of the features and functions described in ICSPTF's Petition, together the LECs have indicated that they can and do provide the features and functions as ICSPTF described them. For example, SWB admits providing equipment for monitoring and recording as CPE. SWB Comments at n.25. Pacific Bell and Nevada Bell indicate that features and functionality are provided both in the network and in equipment. Pacific/Nevada Comments at 9. The particular features and functionality offered by individual



companies may vary, but the general description of inmate-only services in the Petition describes how LECs are offering inmate-only phones. No LEC may provide each and every feature or functionality described in the Petition, but the LECs are, in varying degrees, providing inmate-only phones as ICSPTF described. Because the LECs do not dispute they are providing inmate-only phones in the manner outlined in the Petition, there is no factual dispute.

Pacific Bell and Nevada Bell claim that an undisputed factual record has not been established in the Petition. Pacific/Nevada Comments at 4. Pacific Bell and Nevada Bell deny the capability of using PIN numbers (Pacific/Nevada Comments at 12), yet Pacific Bell's response to Santa Clara County was that "[t]he Inmate Call Control Unit that Pacific Bell uses has features that are not being used by the County of Santa Clara, including a PIN number option." Santa Clara County RFP Response, § II, page 23. Pacific Bell and Nevada Bell also deny provision of recording and monitoring equipment (Pacific/Nevada Comments at 12), yet the response to Santa Clara County included the statement that Pacific Bell would provide the equipment, along with a description of the particular equipment to be provided. Santa Clara County Response, § II, page 24.<sup>19</sup>

Pacific Bell's and Nevada Bell's alleged factual disputes are contrivances and are, in any event, irrelevant. Even if Pacific Bell did not actually provide PIN number capability and recording

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<sup>19</sup> ICSPTF assumes that Pacific Bell did not misrepresent its capabilities; it remains unclear, however, whether Pacific Bell has PIN number capability or not.